IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 16359 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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DILAWAR @ BHOPO AKBARBHAI DAUDANI

Versus

STATE OF GUJARAT

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Appearance:

1. Special Civil Application No. 16359 of 2004

MR AR SHAIKH for Petitioner No. 1

MR HM PRACHCHHAK, AGP for Respondent No.3

RULE SERVED for Respondent No. 1-2

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CORAM : HON'BLE MR.JUSTICE J.R.VORA

Date of decision: 25/01/2005

ORAL JUDGEMENT

1. This Special Civil Application under Article 226 of the Constitution of India has been filed by the petitioner challenging his detention in pursuance of the

order passed against him by the Police Commissioner, Rajkot City on 21st July, 2004 in exercise of powers conferred upon him under Section 3(1) of the Gujarat Prevention of Anti Social Activities Act, 1985 ["PASA Act" for short]. The petitioner is under detention as a dangerous person from 23rd July, 2004, in pursuance of the above said order passed by the detaining authority.

2. The grounds of detention as placed on record depict that the detaining authority took two types of materials in consideration to arrive at a subjective satisfaction. Firstly, the fact of five criminal cases filed against the petitioner for theft under Section 379 of the Indian Penal Code and two incamera statements of the witnesses, as recorded by sponsoring authority on 17th July, 2004 and verified by detaining authority on 18th July, 2004.

2.1 The criminal offences came to be registered against the petitioner on October 17, 2003, September 5, 2003, September 19, 2003, October 20, 2003, January 22, 2004 and February 23, 2004. In all cases, in the month of June, 2004, the petitioner came to be arrested and was released on bail on 3rd July, 2004. In all cases, except sixth case wherein allegation was about stealing of Bajaj Super Scooter by the petitioner, the allegations were about stealing of hero-honda motor cycle by the petitioner. It appears that in all cases, muddamal is recovered from the petitioner. The detaining authority after considering thoroughly and exhaustively the investigating papers of those six cases came to the conclusion that the petitioner was a dangerous person within the meaning of Section 2(c) of the PASA Act.

2.2 Relying upon two incamera statements, as above stated, the detaining authority came to the conclusion that the activities of the petitioner were prejudicial to the maintenance of public order. Out of two incamera statements, one witness referred to an incident occurred 3-4 months before recording of the statements i.e. on July 17, 2004 where he stated that he had purchased one hero-honda motor cycle from the petitioner and his friend Rahim Ismail Miyaya for Rs.20,000-00. The witness had paid Rs.10,000-00 in cash and remaining amount of Rs.10,000-00 was to be paid after 15 days when the petitioner delivered the witness the papers of motor cycle from R.T.O. Office. Even after those 15 days, the petitioner did not deliver any papers instead he started demanding the remaining amount of Rs.10,000-00. On May 13, 2004, the petitioner and his friend Rahim Ismail Miyana approached the witness where the witness stated to

them that the petitioner might return the amount of Rs.10,000-00 to the witness and take the motor cycle back. The petitioner and his friend Rahim Ismail Miyana were excited and stated that they were not to deliver the papers of the motor cycle nor would return the money taken by them from the witness. The witness stated that in that case, he would be constrained to inform the police. On saying so, the petitioner and his friend Rahim Ismail Miyana were further excited and started giving abuses to the witness and started beating the witness with fists and kicks. The petitioner took out the knife and aimed the knife at the throat of the witness and threatened that if the witness informed the police, he would be done to death. The witness was confused out of fear and he shouted which gathered a crowd around the place, but none from the crowd dared to intervene to rescue the witness on account of fear of the petitioner. On the contrary, the petitioner and his associates started giving abuses to the crowd and with open knife rushed towards the crowd, so the people were helter-skelter and atmosphere of fear was spread. Ultimately, by act of supplication by the witness and on returning the motor cycle, the witness could rescue himself and due to fear of the petitioner, the witness did not report the incident to the police.

2.3 The second incident occurred on 27th March, 2004, when the witness was present at his business place at that time at about 5.00 P.M., petitioner and his friend Rahim Ismail Miyana approached the witness on one hero-honda motor cycle, they stated to the witness that they were in need of money and wanted to sell the said motor cycle. The petitioner stated that the witness might purchase the motor cycle or else keeping the motor cycle pledged and lend them Rs.5,000-00 which would be paid to the witness afterwards. When necessary arrangements were made by them about the fund. The witness refused to comply the request made by the petitioner because the witness was knowing that the petitioner was habitual offender of vehicle theft. On refusal by the witness, the petitioner was excited and started giving abuses to the witness. The witness stated that if the petitioner and his friends misbehaved with him, he would file a complaint before the police. The petitioner and his friend Rahim Ismail Miyaya further excited and started beating the witness with fists and kicks. From the associates of the petitioner, Rahim Ismail Miyana took out the knife and threatened the witness that if the witness tried to give a complaint before the police or tried to give any information, the witness would be done to death. The witness was

embarrassed on account of fear and he started shouting, therefore, the crowd was gathered around the place of incident, but nobody dared to rescue the petitioner. The witness by act of supplication and after many requests was allowed to go caught free by the petitioner. On account of the fear of the petitioner, he did not report the incident to the police.

3. From the above material, the detaining authority came to the conclusion that the petitioner was acting in a manner prejudicial to the maintenance of public order. The subjective satisfaction recorded by the detaining authority in the grounds of detention is as under in free translation.

"You reside within the jurisdiction of "A" Division Police Station, Navi Ghachiwad, Street No.7, Rajkot. Ostensibly you are doing the business of motor cycle repairing but infact under the shelter of that business you are engaged in anti social activities. You are head strong, ferocious and pugnacious by nature. You are habitual offender of vehicle theft. You and your accomplices in conspiracy and with common intention from the various area of city of Rajkot, committing theft of vehicles. Thereafter, you change the registration numbers and parts of the vehicles, which were stolen by you and after taking citizens in confidence, you are engaged in activities of selling such vehicle and enjoying after getting cash amount from such deal and in this manner, you are subsisting.

You are committing head strong activities in public to spread terror in the city of Rajkot. You are beating innocent citizens / trade men in public and after threatening them by force extorts things and cash amount. If, anybody obstructs in your said anti social activities or refused to cooperate in your anti social activities, you pick up quarrels with such person and after beating them and showing knife you threaten them to kill because you are head strong, ferocious and pugnacious by nature. Due to your fear and terror the persons on account of the security of their life and property do not say anything against you in public nor file any complaint. You are doing the above said anti social activities since long and having tendency to commit such acts frequently. Due to you and on account of the activities done by other thieves like you the citizen of the city are

harassed, persons do not keep their vehicles and things unattended because they have apprehension that said things or vehicles would be stolen. Therefore, in the city the atmosphere of terror and fear is spread. Due to your above said illegal anti social activities the public order and security of the citizens is disturbed."

4. On account of the above subjective satisfaction reached by the detaining authority, he passed the order of detention as aforesaid which is under challenge in this petition.

5. Learned advocate Ms.Banna Dutta for the petitioner agitating several grounds but magnified the ground that whether there was any credible material before the detaining authority to come to the conclusion that by the activities of the petitioner, the public order was disturbed. Learned advocate for the petitioner has relied upon certain decisions of the Apex Court and this Court. A decision of the Apex Court in the matter of Mustakmiya Jabbarmiya Shaikh Vs. M.M.Mehta, Commissioner of Police & Ors., reported in 1995 (2) G.L.R. 1268 was relied upon for the contention that the situation causing disturbance to law and order and causing disturbance to public order are all different and cannot be confused. It was stated that merely filing of criminal cases of theft would not amount to disturb of the public order as envisaged by the PASA Act nor investigating papers placed on record discloses any such activities on the part of the petitioner. On this aspect, she also relied upon the decision of Division Bench of this Court in the matter Ashokbhai Jivraj @ Jivabhai Solanki Vs. Police Commissioner, Surat & Ors., reported in 2000 (1) G.L.H. 393. It was, therefore, urged that the subjective satisfaction which is arrived at by the detaining authority is not supported by any credible material. The subjective satisfaction according to the learned advocate, therefore, in this respect arrived at by the detaining authority is vitiated and the order is required to be quashed and set aside on this ground alone.

6. Learned AGP Mr.H.M.Prachchhak for the respondent No.3 has relied upon two decisions of the Apex Court, one in the matter of Kanuji S. Zala Vs. State of Gujarat & Ors., reported in 1999 (2) G.L.H. 415 and other in the matter of Smt. Phulwari Jagadambaprasad Pathak Vs. R.H. Mendonca and others, reported in AIR 2000 S.C. 2527. It was contended that there are six offences registered against the petitioner for theft of vehicles. In all

cases, muddamal is recovered. The detaining authority carefully has gone through the investigation papers and reached to a conclusion that the petitioner was a dangerous person within the meaning of PASA Act. My attention was drawn by learned AGP, towards two incamera statements, particularly the statement of first witness wherein after threatening the witness, the petitioner and his associates rushed towards the crowd with open knife disturbing the even tempo of life because due to fear of the petitioner, the people were helter-skelter. Learned AGP has stated that it cannot be said that there was no material before the detaining authority to come to the conclusion that the activities of the petitioner was prejudicial to the maintenance of the public order. The incident narrated by the witness, according to the learned AGP are the instances of behaviour of the witness acting in a manner prejudicial to the public order. The registration of six cases of theft insuccession and incamera statements of the witnesses, as per the contention of learned AGP justifies the subjective satisfaction arrived at by the detaining authority.

7. From the rival contentions raised, it appears that the first contention about the disturbance of the public order is required to be examined thoroughly.

8. Undoubtedly, to reach to the subjective satisfaction that the dangerous activities of the petitioner were prejudicial to the maintenance of public order within the meaning of the PASA Act. The detaining authority must rely upon cogent material clearly indicating that the activities of the detenu directly or indirectly was causing or was likely to cause any harm, danger, or alarm or feeling of insecurity among the general public or any section thereof or a grave or wide spread danger to life and property of the public.

9. Whether a particular activities alleged against the detenu is disturbing the public order as envisaged by the PASA Act, the detaining authority must scrutinise the material before him through litmus test that such activities were of such grave nature could not have been taken care of by the general law. It is, therefore, necessary to refer to the observation made by the Apex Court in the matter of Mustakmiya Jabbarmiya Shaikh Vs. M.M.Mehta, Commissioner of Police & Ors., reported in 1995 (2) G.L.R. 1268. The Apex Court observed in paragraph No.9 as under:-

"9. Further, sub-sec. (1) of Sec.3 of the Act confers power on the State Government and a

District Magistrate or a Commissioner of Police under the direction of the State Government to detain a person on being satisfied that it is necessary to do so with a view to preventing him from acting in any manner prejudicial to the maintenance of "public order". The explanation attached to Sub-sec. (4) of Sec. 3 reproduced above in the foregoing para contemplates that "public order" shall be deemed to have been affected adversely or shall be deemed likely to be affected adversely inter alia if any of the activities of any person referred to in sub-sec.(4) directly or indirectly, are causing or is likely to cause any harm, danger or alarm or feeling of insecurity among the general public or any section thereof or a grave or widespread danger to life, property or public health. Sub-sec.(4) of Sec.3 also provides that for the purpose of Sec.3, a person shall be deemed to be 'acting in any manner prejudicial to the maintenance of public order when such person is a "dangerous person" and engaged in activities which affect adversely or are likely to affect adversely the maintenance of public order. It, therefore, becomes necessary to determine whether besides the person being a "dangerous person" his alleged activities fall within the ambit of the expression 'public order'. A distinction has to be drawn between law and order and maintenance of public order because most often the two expressions are confused and detention orders are passed by the authorities concerned in respect of the activities of a person which exclusively fall within the domain of law and order and which have nothing to do with the maintenance of public order. In this connection it may be stated that in order to bring the activities of a person within the expression of "acting in any manner prejudicial to the maintenance of public order", the fall out and the extent and reach of the alleged activities must be of such a nature that they travel beyond the capacity of the ordinary law to deal with him or to prevent his subversive activities affecting the community at large or a large section of society. It is the degree of disturbance and its impact upon the even tempo of life of the society or the people of a locality which determines whether the disturbance caused by such activity amounts only to a breach of "law and order" or it amounts to "public order". If the activity falls within the category of

disturbance of "public order" then it becomes essential to treat such a criminal and deal with him differently than an ordinary criminal under the law as his activities would fall beyond the frontiers of law and order, disturbing the even tempo of life of the community of the specified locality. In the case of Arun Ghosh v. State of W.B. 1970 (1) SCC 98 this Court had an occasion to deal with the distinction between law and order and public order. Hidayatullah, C.J. (as he then was), speaking for the Court observed that public order would embrace more of the community than law and order. Public order is the even tempo of the life of the community taking the country as a whole or even a specified locality. Disturbance of public order is to be distinguished from acts directed against individuals which do not disturb the society to the extent of causing a general disturbance of public tranquillity. It is the degree of disturbance and its effect upon the life of the community in a locality which determines whether the disturbance amounts only to a breach of law and order. It has been further observed that the implications of public order are deeper and it affects the even tempo of life and public order is jeopardized because the repercussions of the act embrace large sections of the community and incite them to make further breaches of the law and order and to subvert the public order. An act by itself is not determinant of its own gravity. In its quality it may not differ from another but in its potentiality it may be very different. Again in the case of Piyush Kantilal Mehta v. Commissioner of Police, 1989 Supp. (1) SCC 322 : [1989 (1) GLR 563 (SC)], this Court took the view that in order that an activity may be said to affect adversely the maintenance of public order, there must be material to show that there has been a feeling of insecurity among the general public. If any act of a person creates panic or fear in the minds of the members of the public upsetting the even tempo of life of the community, such act must be said to have a direct bearing on the question of maintenance of public order. The commission of an offence will not necessarily come within the purview of public order which can be dealt with under ordinary general law of the land."

10. The above observation of the Apex Court lays down

guidelines to come out of confussion as to whether the certain activity is merely a breach of law and order or breach of public order. The principle of law, therefore, is there should be credible material before the detaining authority to infer that the activities of the detenu were so grave as to disturb large section of the society and causing obstruction to the maintenance of public order.

11. In the present case, the detaining authority as stated above, relied upon two types of materials, firstly, registration of cases for theft of vehicles and incamera statements. Examining the first aspect about the fact of registration of cases against the petitioner and going through the investigating papers placed on record, it is clear that though cases are registered against the petitioner nothing is disclosed in shape of credible material that the activity embodied in the cases registered against the petitioner caused any harm, danger, alarm or feeling of insecurity among the general public. The subjective satisfaction recorded by the detaining authority in this respect as aforesaid that the public at large was feeling insecurity on account of theft of vehicles is not at all supported by the credible material disclosed through the investigating papers. True that investigation is in progress in those cases, the cases are still to be decided but the activity of the petitioner which is found in breach of law can be taken care of by filing of criminal cases according to law. Therefore, the activities attributed to the detenu through investigating papers in six criminal cases may be breach of law and cannot have any bearing on the question of maintenance of public order as recorded by the detaining authority, while arriving at the subjective satisfaction in this respect.

12. The other material before the detaining authority was in shape of incamera statements. My attention is drawn to the first statement wherein it is alleged that the petitioner and his accomplices rushed towards the crowd gathered with open knife and thereby caused disturbance to the public order. While in second incident, it clearly appears that the same was an individual incident and public at large was never involved. It is necessary again to refer to the above mentioned decision of the Hon'ble Supreme Court in the matter of Mustakmiya Jabbarmiya Shaikh (supra) wherein the detenu was alleged to have rushed towards the people gathered with a revolver. The Apex Court observed as under in this respect through paragraphs No.11 and 12:-

"11. This brings us to the criminal activities

of the detenu-petitioner which are said to have taken place on 10-8-1994 at 4-00 p.m. and on 12-8-1994 at 7-00 p.m. In the incident dated 10-8-1994 the petitioner is alleged to have purchased goods worth Rs.500/-- from a businessman and on the demand of the price of the goods, the petitioner is alleged to have dragged him out on the public road and not only gave a beating to him but also aimed his revolver towards the people gathered over there. Similarly, it is alleged that on 12-8-1994 at about 7-00 p.m. the detenu-petitioner stopped the witness on the road near the eastern side of Sardar Garden and beat him as the petitioner doubted that he was informing the police about the anti-social activities of the petitioner and his associates. The petitioner is also alleged to have rushed towards the people gathered there with the revolver. Taking the aforesaid two incidents and the allegations on their face value as they are, it is difficult to comprehend that they were the incidents involving public order. They were incident directed against single individuals having no adverse effects prejudicial to the maintenance of public order, disturbing the even tempo of life or the peace and tranquillity of the locality. Such casual and isolated incidents can hardly have any implications which may affect the even tempo of life or jeopardize the public order and incite people to make further breaches of the law and order which may result in subversion of the public order. As said earlier, the Act by itself is not determinant of its own gravity but it is the potentiality of the act which matters.

12. The alleged incident dated 12-8-1994 relating to the beating of some person on suspicion that he was informing the police about criminal activities of the petitioner, the allegations is sweeping without any material to support it. Neither any timely report appears to have been made about it to the police nor any offence appears to have been registered against the detenu-petitioner concerning the said incident. There remains the solitary incident dated 10-8-1994 pertaining to the alleged beating of a businessman which as said earlier directly was against an individual having no adverse impact on public at large. Besides, the solitary incident dated 10-8-1994 alone would not provide

> a justification to hold that the petitioner was habitually committing or attempting to commit or abetting the commission of offences as contemplated in Sec. 2(c) of the Act because the expression "habitually" postulates a thread of continuity in the commission of offence repeatedly and persistently. However, in our considered opinion none of the aforementioned two incidents can be said to be incidents affecting public order nor from these stray and casual acts the petitioner can be branded as a dangerous person within the meaning of Sec.2(c) of the Act, who was habitually engaged in activities adversely affecting or likely to affect adversely the maintenance of public order. Similar is the position with regard to the recovery of 32 bore country made revolver from the possession of the petitioner without any permit or licence which is an offence under Sec.25 of the Arms Act. The said revolver was found to be rusty and had a broken barrel. Mere possession of a firearm without anything more cannot bring a case within the ambit of an act affecting public order as contemplated in Sec.3 of the Act unless ingredients of Sec.2(c) of the Act are also made out. From the facts discussed above it turns out that there was no material which may lead to a reasonable and definite conclusion that the detenu-petitioner was habitually engaged in criminal activities and, therefore, a dangerous person. The detaining authority thus passed the impugned order of detention against the petitioner without application of mind on the aforesaid aspects of the case and, therefore, the detention order could not be sustained."

13. In each case, it is fall out, reach and impact activities alleged against the petitioner would determine whether the activities were capable of disturbing the public at large. If such potentiality in given activity is lacking, the interference drawn that by such activities, public order is disturbed cannot be said to be valid, legal and according to law. Such activities may be breach of law and order. In cases of detention, this difference is required to be discerned clearly.

14. In the present case, as aforesaid in the criminal cases registered against the petitioner through the investigation papers, no inference could be drawn that in activities of stealing two wheeler vehicles, public at large was involved and public at large suffered any harm,

danger and insecurity. Therefore, the act constituting offences alleged against the petitioner, cannot be said to be the activities disturbing the public order within the meaning of the PASA Act, then there is only remaining material is in shape of statements, out of which in one statement, the witness states and alleges that the petitioner and his accomplices with open knife rushed towards the crowd, while other is in respect of an individual disputes. The stray incident as stated by the first witness cannot be termed the act of the petitioner to be the activities disturbing the public order. Both the incidents as narrated by the witnesses are the incidents in which alleged act of the petitioner lacks potentiality to involve public at large. The activities alleged in its fall out, reach and impact are such as can be taken care of by general law and at the most can be labelled as the activity in breach of law and order.

15. In the matter Kanuji S. Zala Vs. State of Gujarat & Ors., reported in 1999 (2) G.L.H. 415, it was alleged through the incamera statements of the witnesses that violence resorted to by the petitioner was disturbed even tempo of public life and the material on record had shown that members of the public of those localities had to run away from there or to go inside their houses and close their doors. Likewise in the matter of Smt. Phulwari Jagadambaprasad Pathak Vs. R. H. Mendonca and others, reported in AIR 2000 S.C. 2527, it was alleged against the detenu that the detenu was engaged in activity of threatening innocent persons and assaulting other trade men for extorting money from traders. In the incidents referred to by the Apex Court in paragraph No.5 of the said decision, it is clear that in both the incidents, the detenu assaulting witness and his servant and started damaging the material in his bakery of the witnesses. On account of fear of the detenu nearby shop keepers closed their shops and pedestrians, hawkers on the road started running helter-skelter and the witness was threatened by revolver. In the other incident, the detenu resorting to such violence creating terror in the area robbed money from the cash box of the witness.

16. No such facts situation has been found in the material placed before the detaining authority. Thereafter stated by the witnesses and six cases filed against the petitioner hardly could be said to be the activities disturbing public order to the extent that the activities caused harm, danger and the general public was feeling insecurity. In this respect, it is necessary to refer to a decision of Division Bench of this Court in the matter of Ashokbhai Jivraj @ Jivabhai Solanki Vs.

Police Commissioner, Surat & Ors., reported in 2000 (1) G.L.H. 393 wherein the Division Bench of this Court, after considering many decisions of the Apex Court observed in paragraphs No.20 and 21 as under:-

"20. The Division Bench then considered the law laid down by the Apex Court in Piyush Kantilal v. Commissioner of Police, Ahmedabad City, AIR 1989 SC 491 and T. Devaki v. State of Tamil Nadu, AIR 1990 SC 1086. In Piyush Kantilal, similar circumstances were before the detaining authority and it was alleged that detention of the detenu was necessary in order to prevent activities of the detenu in maintenance of public order. Similarly, in T. Devaki, panic amongst people in the hall in which the incident took place and in nearby vicinity was high lighted. It was also alleged that people were scared and had run helter skelter. In spite of such allegations the Supreme Court held that they were not cases of maintenance of public order and hence, an action of preventive detention was uncalled for.

21. The Division Bench, following the above cases, observed that in the opinion of the Supreme Court, the selective phrases in the statements would not take out the case from maintenance of law and order to that of maintenance of public order and as power of detention could not be used for maintenance of law and order, but only for public order, the order of detention made in such circumstances could not be upheld.

Again, in Mustakmiya Jabbarmiya Shaikh v. M.M.Mehta, Commissioner of Police and others, 1995 (2) GLR 1268 (SC), the Supreme Court considered the relevant decisions on point including the decision in Arun Ghosh v. State of West Bengal, 1979 (1) SCC 98 and held that stray incidents would not affect "public order" and order of detention cannot be passed in such cases.

17. The selective phrases employed by the witnesses whose statements might have been recorded incamera cannot make out the case of breach of public order from the breach of law and order. The subjective satisfaction, therefore, arrived at by the detaining authority in this respect is not legal, valid and in accordance with law. Therefore, the order under challenge is required to be

quashed on this ground alone and no other ground is required to be discussed.

18. In the result, in view of the above discussion, this petition is allowed. The order passed by the Police Commissioner Rajkot City on 21st July, 2004 against the petitioner in exercise of powers under Section 3(1) of the PASA Act is hereby quashed and set aside. The petitioner DILAWAR @ BHOPO AKBARBHAI DAUDANI is hereby ordered to be set at liberty forthwith, if he is not required to be detained in Jail for any other purpose. Rule is made absolute. Direct service is permitted.

[J. R. VORA,J.]

(vijay)